(1) SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1999

Garrett Burkhart

v

Diana L. Quilici

On Petition For Writ Of Certiorari
To The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTION PRESENTED

Whether there is closure in this family law case because there is: 1) no order stating "joint physical and joint legal custody of Garrett Roy Burkhart, Jr. and therefore a threat of move-away and confusion of odd/even years individual parties declare deductions; 2) no order addressing the community debt which Dr. Burkhart up to now has been the only party taxed with that burden; 3) no order dividing up the community's FERS Pension valued at $12,362.00 in 1996 violating California Family Code Section 2610 nor the Home Savings Bank Accounts and Home Savings C.D.'s Dr. Quilici made off with; and 4) no direct testimony of Dr. Burkhart at his own trial because the trial court judge, prejudicially erred going beyond his scope and alone called Dr. Burkhart to the stand as an adverse witness. As this case stands the question of closure may be overshadowed by the unconstitutional issues violating Dr. Burkhart's rights to a fair trial and depriving Dr. Burkhart of life, liberty, and property without due process of law under the Amendment V of The United States Constitution. And although not a criminal case, Dr. Burkhart believes that his right under Amendment VI was also prejudicially and willfully violated by the trial court.

What is more important than the best interest of the child, Garrett Roy Burkhart, Jr. to have closure and finish the trial or order a new trial? Why should lives be ruined as a result of a willfully negligent trial judge coupled with the intentionally non-disclosing, perjury ridden testimony of Dr. Quilici, who confessed to forgery? (Reporter's Transcripts 138.) Laws need to be changed! If Dr. Quilici decides to take on an alternate life style and wants a divorce, she has that right. But going from that to threatening to move their son out of the country and financially ruining the lives of Dr. Garrett Burkhart and Garrett Jr. is an abomination of the whole legal system. The legal system of this country should not add to the confusion as it did in this case. The legal system should not make the outcome of a divorce one of the leading reasons this country has why a person is forced into bankruptcy.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1999

Garrett Burkhart, Petitioner,

v.

Diana L. Quilici , Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

Dr. Garrett R. Burkhart, D.D.S. respectfully petitions for a writ of certiorari to review the judgment of the California Supreme Court from the California Court of Appeals from the California Sacramento Trial Court in this case.

OPINIONS BELOW

The opinion of the California Supreme Court (App., infra, a separate volume) is unreported. The opinion of the court of appeals (App., infra, a separate volume) is unreported. The opinions of the trial court (App., infra, a separate volume) are unreported. Please note Dr. Burkhart requests this Court to order the opinions including the Court of Appeals be reported.

JURISDICTION

The California Supreme Court entered its judgment on October 20, 1999 (App.,a separate volume). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

The Fifth Amendment of The United States Constitution reads, "No person shall be ... deprived of ... liberty, or property without due process of law...."

"In all trials the testimony of witnesses shall be taken orally in open court...." Federal Rules Civ.Proc., rule 43, 28 U.S.C.)

And although not a criminal case, Dr. Burkhart would also like to raise the Sixth Amendment of the United States Constitution, the right to a fair trial and "... the right to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense." Denying Dr. Burkhart's one and only motion for continuance to have the Assistance of Counsel for his defense, the trial court violated Dr. Burkhart's rights under the Constitution.

California Code of Civil Procedure Section 657 gives the grounds for a new trial due to irregularity in the proceedings of the court coupled with the error in law, excessive damages
accident or surprise, and insufficiency of evidence to justify the verdict. Pensions shall be divided up equally under California Family Code Section 2610. Community Debt shall be divided up equally. There are exceptions to California Family Code Section 2641. Dr. Burkhart requests under California Family Code Sections 2550 and 2555 that the community property be revised in all particulars on appeal in an effort to equally divide the community estate.

STATEMENT

Dr. Diana L. Quilici, D.D.S. sued Dr. Garrett R. Burkhart, D.D.S. for dissolution of marriage in July 1995 in the Superior Court of Sacramento County, California. At the pseudo-trial, the trial court started the trial prematurely despite Dr. Burkhart's first and only motion for a continuance. Moreover, the trial judge prejudicially erred and went beyond his

scope as a trial judge and the judge, himself , called Dr. Burkhart to the stand as an adverse witness to Dr. Burkhart's detriment. The Court of Appeals willfully overlooked the fact that the trial judge, himself, called Dr. Burkhart to the stand as an adverse witness. It is customary and usual during a trial if a witness is called to the stand, the attorney is the one who calls the witness to the stand. Furthermore, it is usual and customary that the attorney is the one who calls up an adverse witness to the stand and declares it so for the record. Not so in this case. Here, the trial judge failed his duty as a reasonable trial judge, and he alone called Dr. Burkhart to the stand as an adverse witness. Because the trial judge went beyond his scope, Dr. Burkhart sustained damages. This case bleeds of irregularities in the proceedings of the court and is the ultimate abuse of discretion by which Dr. Burkhart was prevented from having a fair trial and warrants a new trial by law. (See Deering's Ann. California Code Civ. Proc. Section 657.)

A. The Decision of the Court of Appeals Is Erroneous

The Court of Appeals wrote the word "ASSume" in their opinion several times because there are so many holes and unresolved issues in this case including why the trial court called for a "short break" so that Dr. Quilici could respond to checks she wrote to herself, forgery, and taking $12,000.00 out of the community pension against the court order. The trial court never reconvened after the "short break". Despite never learning Dr. Quilici's answers questions nor Dr. Quilici's Final Disclosure Statement with copies of her three most recent check stubs, the trial court via a miscarriage of justice made a judgment to the detriment of Dr. Burkhart. Erroneously, The Court of Appeals ASSumes those unresolved issues magically have been resolved. A trial judge just would not stop a trial. On the contrary, this is the same trial judge who started the trial before the discovery phase had been completed. Dr. Burkhart begs This Court to guide the lower courts to order a new trial instead of falling back on bad law and "ASSumptions". Please show us there is more to an appeal

process than just the Court of Appeals "Assuming" the trial judge did his duty when they can read the record themselves and the faulty judgment .

But for the holes in the case coupled with the prejudicial errors of the trial court, Dr. Burkhart would not be filing motions for reconsideration, relief of judgment, appeal to the Court of Appeals, appeal to The California Supreme Court, and petition for writ of certiorari. Despite the ASSumptions of The Court of Appeals, Dr. Burkhart is still waiting for the trial court to reconvene from its "short break".

B. The Trial Court Prejudicially Erred And Erred

This case should not have gone to trial when it did. Dr. Burkhart requested one and only continuance. The trial court even asked him to make the motion on the record and the reason for it. (Reporter's Transcripts 2) Dr. Burkhart made the motion and explained his reasons wanting the continuance to the trial court just like the trial court asked him to do:

> "Please take notice that respondent Garrett R. Burkhart moves the court under California Rules of Court 375(a) for an order continuing the trial. The grounds for issuance of this order are, number one, plaintiff has not answered questions to interrogatories including why she refused to allow respondent to be their son on Father's Day, and being accountable for $40,000 plus or minus, that she withdrew prior to filing divorce.
>
> "Number two, also due to the mediator's report is stale and obsolete, been out for eight months, never addressed, never adopted. Due to the best interest of the child, and the – his changing needs. Child is now calling me ca-ca (Ph.). I have a feeling of there is parental alienation going on, that I feel

that this report is now obsolete and needs to be updated.

"Respondent requests the court to order petitioner/respondent to mediation via Family Court Services with Dr. Ron Westerman in Auburn, California. Respondent requests joint physical and legal custody 50 percent of time with son and ordered to Granite Bay Learning Center for full-time card.

"Lastly, and due to petitioner's bitterness and relentless pursuit to financial crippling respondent, petitioner has escalated respondent's costs and attorney's fees and as a result, respondent does not have an attorney at this time and needs to – time to earn more money to hire an attorney to adequately represent himself.

"Because of all these issues, because this is way out of my field of expertise, and I had no clue that there's a settlement –pretrial settemen - - settlement paper that was supposed to be in, I feel I'm not ad - - adequately able to represent myself. So these issues and under California law, I'd like to respectfully ask for a continuance." (Reporter's Transcripts 2-4.)

Moreover, Dr. Quilici's pretrial statement was filed and served untimely, incorrect, and to the wrong address. (Reporter's Transcripts 17-18.)

Despite hearing all the substantial reasons for a continuance including the discovery phase was being held up by Dr. Quilici refusal to answer questions from interrogatories and that Dr. Burkhart's attorney depleted the retainer and was stuck without an attorney, the trial court erroneously denied Dr. Burkhart's one and only continuance. (Reporter's Transcripts 21.) The trial court willfully blindly rushed through the pseudo trial to Dr. Burkhart's detriment.

Along with starting this case prematurely, the trial court willfully prevented the direct testimony of Dr. Burkhart. The trial judge prejudicially erred by going beyond his scope as a reasonable trial judge and alone called Dr. Burkhart to the stand as an adverse witness to Dr. Burkhart's detriment. Let us be clear. The opposing party never intended to call Dr. Burkhart to the stand as an adverse witness. The opposing party never ever said the words "adverse witness". The opposing party never ever sited Evidence Code 776 for adverse witness. The trial judge did.! (Reporter's Transcripts 138.) However, once the trial court and the trial court alone called Dr. Burkhart an adverse witness, Dr. Burkhart ,unknowingly at the time, he was stripped of his right to speak freely and give direct testimony as Dr. Quilici did for some twenty pages of reporter's transcripts. It is ironic that Dr. Burkhart paid to have an electronic recordings of all the proceedings, yet the one piece that was most beneficial to his case, his own direct testimony, was taken away from him by the trial judge, himself.

If not yet sickened by the miscarriage of justice thus far, on a date the trial court wrote continue trial, the trial judge kicked the electronic reporter out of the courtroom, later self declaring it a settlement conference. "We don't do electronic reporting at settlement conference," said the trial court when confronted with Dr. Burkhart's objection. (Reporter's Transcripts 237)

During the opinion of the Court of Appeals, they chose to ASSume and even use the word "ASSume" over and over to cover up for the trial court's prejudicial errors. And when a big issue comes down the pike like the fact that "joint Physical and Joint Legal" Custody is omitted from the order and siting the Burgess Case showing the severity for omitting it, the Court of Appeals does not even address the Burgess Case and omits discussing that landmark case, but Dr. Burkhart did. (Marriage of Burgess (1996) 13 Cal, 4th 25, 27, 37.

California Licensed Attorney Jerry Guthrie formally declared, "In chambers, the trial court stated joint physical and joint legal custody of Garrett Burkhart Jr. but not in open

court and therefore is not in the record." (Clerk's Transcripts 918-920.) The trial court had opportunities to set the record straight for closure in Dr. Burkhart's Motion for Reconsideration and Relief of Judgment. However, the trial court denied all motions. The trial court threatened Dr. Burkhart that if he file one more motion, he would be "sanctioned severely". Do you think the Court of Appeals or the California Supreme Court would send the case back down to the trial court or modify the judgment to have closure for the benefit of the child? You guessed it. No, they are lame. For Christmas, Dr. Burkhart is buying them all spines.

REASONS FOR GRANTING THE PETITION

Denying this petition and the cries of a single father and his son would be like putting snow over manure. Sure the easy way would be the path already taken by the courts below:
>"Motion For Reconsideration is Denied!"
>"Motion For Relief Of Judgment is Denied!"
>"Request For Factual Determinations On Appeal And Take Additional Evidence Is Denied!"
>"Request For Rehearing Is Denied!"
>"Request For Publication Is Denied Because The Opinion Does Not Meet The Standards For Publication As Defined By Rule 976 of The California Rules of Court."
>"Request For Appeal Is Denied!"

I. There Needs To Be Closure of Custody and Equity

The best reason of all for granting this appeal is for the benefit of the child, Garrett Jr. There is no closure in custody. This needs to be repeated. There is no closure. Attorney Jerry Guthrie in a sworn declaration states: "the trial court said in chambers there should be shared legal and joint physical custody but did not say it in open court and therefore is not in the record." (Clerk's Transcripts 918-920.) Why is this so critical? In the landmark case of Burgess v. Burgess (In re

Marriage of Burgess (1996) 13 Cal. 4th 25,27, 37) because the judgment did not state joint physical and joint legal custody, the mother can relocate and bears no burden of demonstrating the move is necessary. (USA Today Newspaper April 22, 19996 front page and page 2A.)

In light of the Burgess Case, these words missing from the record in this case are critically important. In his motions after the pseudo trial, Dr. Burkhart attached Attorney Guthrie's sworn declaration of the missing words to give the court opportunities to fill the void in the judgment, only to be met with: " If you file any more papers like this, I am going to sanction you and sanction you severely." So this petition needs to be granted.

Let's get closure with the custody issue by spelling out the words "J-o-i-n-t P-h-y-s-i-c-a-l A-n-d J-o-i-n-t L-e-g-a-l C-u-s-t-o-d-y of Garrett Burkhart, Jr." Dr. Quilici takes the tax deduction the even years, while Dr. Burkhart takes the tax deduction the odd years also needs to be spelled out in the judgment. Isn't it ironic that the fetus Dr. Quilici wanted to abort and went as far as to set up the appointment in Sacramento in 1993 is the baby named Garrett Burkhart Jr. she now wants custody of. Dr. Burkhart would be willing to take a lie detector test or show the Court the papers and notarized declarations he has showing that Dr. Quilici intended to go ahead with an abortion when the parties were told of possible potential birth defects. Dr. Burkhart saved the baby Garrett Jr. and called Dr. Cathy Givins at The University of California at San Francisco (U.C.S.F.) set up an appointment to have a second opinion thereby saving the child. Even after the second opinion at U.C.S.F., Dr. Quilici still had her doubts and contemplated aborting Garrett Jr.

II. Dr. Burkhart Objects Being Deprived of Liberty, Property And A Fair Finished Trial

Let's finish the trial! The trial court ordered a "short break" so that Dr. Diana L. Quilici could look over the checks she wrote to herself so that she could respond along with the evidence that she illegally borrowed $16,000 from a pension

and forged Dr. Burkhart's name to buy stocks, but the trial never reconvened. Let's reconvene and resolve all issues for the benefit of all including Garrett Jr. Moreover, the decision of the lower courts are erroneous, and the issues that it addresses are important. The need for guidance from this Court is acute.

This case as it stands is unconstitutional. Dr. Quilici did not call Dr. Burkhart to the stand. The trial judge called Dr. Burkhart to the stand using the words, "adverse witness under Evidence Code 776." (Reporter's Transcripts 138.) When the trial judge took it upon himself to call up Dr. Burkhart as an adverse witness, the trial judge materially altered the trial to the detriment of Dr. Burkhart. Dr. Burkhart could not present his side of the case. As a result, Dr. Burkhart is stuck paying all the community debt, himself. Dr. Burkhart's right to the community FERS Pension of $12,3620. was never awarded to him, but all monies awarded to Dr. Quilici. This case needs to be sent back down to the lower court and have the current value of the pension appraised and divided. At the very least, Dr. Burkhart should be awarded $6,181. ($6,181 is half of the Community's FERS Pension.) The Court of Appeal neglectfully did not even address the fact that without notice, the trial judge, himself, and not the opposing party called Dr. Burkhart to the stand uttering the words adverse witness under Evidence Code 776. Abusing the legal system as a tool to harass Dr. Burkhart, the opposing party scheduled 13 depositions. And 13 times, Dr. Burkhart took off from work. And thirteen times the opposing party canceled the depositions often without any notice. Because Dr Burkhart's deposition never happened makes the trial court's barring Dr. Burkhart's direct testimony to speak freely all the more significant. The Court of Appeal needs this Courts guidance to show them how to address key issues, instead of neglectfully or willingly not even writing an opinion on the specific errors.

Let's do it now or send this case back down to the lower court and rightfully divide up the Community FERS pension of $ 12,362 and award Dr. Burkhart $6,181. After awarding Dr. Burkhart $6,181. from the community's FERS

Pension, let's get the increased updated value of the community FERS Pension and divide the additional monies between the two parties as well. "Insofar as settlement between spouses must be fair and equitable." (In re Roosevelt 9th Cir.BAP (Cal) 1994, 206-207.)

Look, one cannot build upon a structure that has no foundation. We need to start over with either a new trial or finish the old one. Because of Dr. Quilici's questionable character and failure to file and serve a final declaration of disclosure and answers to interrogatories, the Internal revenue Service needs to be subpoenaed to obtain Dr. Quilici's income and deductions. Just like God sent Jesus down to guide us, so too, this Court must send this case down and guide the lower courts. Allow Dr. Burkhart to speak freely give direct testimony so that he can present his side of the case. Do not allow the willfully blind lower courts to destroy the lives of a father and son. Do it even for Dr. Quilici. November 2, 1999 in Folsom, California Dr. Quilici accosted Dr. Burkhart and said, "I want your car." Then Dr. Quilici hysterically shouted, "You will be paying me a lot of money." So clearly Dr. Quilici is confused from the ambiguous judgment as well. These new facts from Dr. Quilici are not intended to be added into the record, but rather to show this Court the need to finish the trial or start a new trial with a good foundation clearing up all the confusion.

If Dr. Quilici thinks she is entitled to my car and thinks she is entitled to yet more money from me, I invite her to join with me in the appeal process to send this case back to the trial court and finish the trial and clear up all the issues. But no. Dr. Quilici would rather fight Dr. Burkhart every step of the way. Dr. Quilici fights Dr. Burkhart's motions for reconsideration and relief of judgment. In her taped oral argument to the Court of Appeals instead of asking the court to sent the case back down to the trial court to clear up the custody issue or money issues, Dr. Quilici said clear she did not want anymore to do with the court or Dr. Burkhart. With tears Christmas treeing down the wrinkles of her pale face, Dr. Quilici elected

to speak out against the toll this case has taken on her. Dr. Burkhart urges this Court to listen to the tape of the oral argument before the Court of Appeal. Well let's order a new trial so that issues can be resolved for Dr. Burkhart, thereby making Dr. Quilici happy, or at least in less of a fit so that she can move on to the next crisis in her life.

Round two. Instead of just a few pages that Dr. Burkhart wanted designated from the record, Dr. Quilici wanted the whole record designated. So you know who had to pay for the whole record to be designated. Right again, the same person who got stuck with the community debt and the same person who alone paid for the actuary even when the court said the fees were to be divided. Isn't it ironic that Dr. Burkhart alone gets stuck paying the bill for the actuary but Dr. Quilici is awarded the full value of the community FERS Pension.

It is clear that Dr. Quilici's boss, Dr. Norman Trieger, at Montefiore Hospital in Bronx, New York was right when he said that Dr. Quilici is delusional, needs help and cannot cope. From her limited initial disclosure statements to her untimely pretrial statement which needs to be stricken from the record, Dr. Quilici goes from one polar extreme by declaring no student loans under penalty of perjury to the other polar extreme and asking for close to $100,000. for reimbursement for student loans. When she thought she would have to help pay back the student loans, Dr. Quilici purposely did not mention student loans to her attorney and denied any student loans or loans of any kind under penalty of perjury on her initial Assets and Debts Disclosure Statement. Subsequently only after Dr. Burkhart was truthful and declared student loans was this an issue. Then her attorney told her she could use the legal system and make a claim for student loans reimbursement. So when she thought she could deplete even more money, Dr. Quilici threw up her claim for student loans. Then Dr. Quilici wants more money from Dr. Burkhart by trying to coerce Dr. Burkhart to send her money monthly for a total of $7,500. to settle the reimbursement of student loans issue. Dr. Burkhart submits to this court that Dr. Quilici now has second

thoughts about her divorce proceeding and wants Dr. Burkhart back into her life anyway she can even if it means coercing him to send her mail regularly to his old house which Dr. Diana Quilici now somehow has title of. The parties rent to own agreement at 101 Hingham Square, Folsom, California with father-in-law Dr. Gilbert Quilici is evident. Dr. Gilbert Quilici paid $200,000 cash for the property at 101 Hingham Square, Folsom California. Dr. Burkhart and Dr. Diana Quilici immediately moved into the home and were the only ones living there. Dr. Gilbert Quilici agreed to sell the property in one year to avoid paying capital gains tax. In the mean time, Dr. Burkhart and Dr. Diana Quilici did send Dr. Gilbert Quilici Rent To Own Payments as Dr. Diana Quilici submitted the checks and banking registrar into evidence showing the payments to Gilbert Quilici (See Reporter's Transcripts.) Faithfully every month, Dr. Burkhart and Dr. Diana Quilici paid Dr. Gilbert Quilici mortgage payments. Dr. Burkhart and Dr. Diana Quilici even paid for improvements including landscaping and sprinkler units and wall coverings, which Dr. Gilbert Quilici refused to pay. Dr. Gilbert Quilici took Dr. Burkhart's and Dr. Diana Quilici's money and the improvements they made to the home but sold the home to just to his daughter, Dr. Diana Quilici for $175,000. Dr. Burkhart's name is not on the title of 101 Hingham Square, Folsom, California. Dr. Burkhart requests his name be added as an owner or be awarded $12,5000.

Dr. Burkhart requests the court award him half of the money Dr. Diana Quilici deceitfully depleted out of the community's savings accounts and Home Savings C.D.'s without permission or consent of Dr. Burkhart, leaving Dr. Burkhart worse than broke because he is stuck paying all the thousands of dollars of community credit card debt. This needs to be evaluated so that Dr. Quilici can share half of the credit card debt, giving credit to Dr. Burkhart for the monthly payments he has thus far.

After listening to the tape from the oral argument from the Court of Appeal, this Court will then have a duty to remand this case back down and have Dr. Quilici's visiting

time with Garrett Burkhart, Jr. be re-evaluated. We also need her current pay stubs of the last three months to re-calculate spoucal and child support payments to Dr. Burkhart. To help complete the trial and the case this needs to be entered into the record! You see Dr. Quilici never filed and served a final declaration of disclosure statement. Oops!!!! Attorney Guthrie objected to it in his post trial brief to no avail.

Please grant the petition so that Dr. Quilici can explain all those checks that she wrote to herself, why she borrowed and transferred $16,000. out of community pension. Let's go back to court and find out why she declared there were no student loans and only 2 pensions. Let's let her say it for the record that the reason she declared no student loans was because she was afraid she would have to help Dr. Burkhart pay off the student loans even after they were divorced. Let's have Dr. Quilici respond to the fact the actuary found an undisclosed by her third pension. Oops!! Dr. Burkhart requests the Court charge Dr. Quilici with forgery, perjury, misappropriation of funds, violating the restraining order, willful neglect of court orders. Dr. Burkhart further requests this Court order Dr. Quilici to pay Dr. Burkhart $13,000 which is half of the community debt now at 21% interest. Also, Dr. Burkhart requests this Court order Dr. Quilici to pay back to the community the $20,000.00 that she stole out of our joint bank accounts days before filing for divorce. Unbeknownst to Dr. Burkhart, Dr. Quilici closed an AT&T credit card on April Fool's Day.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Third Appellate District No. C027807
S082030

IN THE SUPREME COURT OF CALIFORNIA

In Re the Marriage of DIANA L. QUILICI AND GARRETT BURKHART

SUPREME COURT
FILED
OCT 20, 1999
Robert Wandruff
Clerk
Deputy

DIANA L. QUILICI, Respondent

v.

GARRETT BURKHART, Appellant

Petition for review DENIED.

GEORGE
Chief Justice

NOT TO BE PUBLISHED
COPY

IN THE COURT OR APPEAL
OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re the Marriage of DIANA L. QUILICI and GARRETT BURKHART	FILED Jul 29 1999 COURT OF APPEAL
DIANA L. QUILICI, Respondent, v.	THIRD DISTRICT BY ROBERT L. LISTON, Clerk Deputy C027807 C029718 (Super.Ct.No. 95FL04792)
GARRETT BURKHART Appellant.	

In these consolidated appeals, Garrett Burkhart (hereafter Husband) appeals from various orders and judgment in favor of Diana L. Quilici (hereafter Wife), including: (1) the orders of August 15, 1996, and August 16, 1996; (2) the statement of decision and judgment on bifurcated issues filed September 16,1997; (3) the order denying Husband's motion for reconsideration; and (4) the order denying Husband's motion for relief from judgment. Husband and Wife appear in propria persona on appeal.

Husband argues: (1) he was denied the right to testify

at trial; (2) the court's actions denied him due process; (3) the court misapplied Family Code section 2641; (4) the custody order was partially omitted; and (5) the court did not complete the property division.[1]

We affirm the judgment and orders.

FACTUAL AND PROCEDURAL BACKGROUND

Husband and Wife were married on March 5, 1988, while they were dental students. They separated on May 21, 1995. A son, Garrett, Jr. is now five years old.

Wife graduated from dental school in the spring of 1988, and immediately started a paid residency in advanced education in general dentistry. Wife worked in a dental office in Omaha, Nebraska, between the summer of 1989 and the summer of 1990, while Husband finished his last year of dental training. Following Husband's graduation , Wife started a paid residency in oral surgery in New York. Wife left the residency after 14 months, and the couple moved to California in September 1991.

Wife worked as a contract dentist at Ft. Ord, and substituted as a dentist with the Veterans Administration. She passed her California boards in March 1992. Husband also worked as a contract dentist for various agencies, but did not obtain his California license until June 1994, and started law school at night four months later. Husband worked in part-time jobs as a dentist after he passed the California boards. Granite Bay learning center initially provided child care. However, when Garrett, Jr., was four months old, Husband and Wife changed day care providers to Matilda Testa..
Wife filed for dissolution on July 19, 1995. At the time of trial, Wife was employed as a dentist with the Department of Veterans Affairs in Sacramento, and Husband was employed as a dentist with Chapa-De Indian Health Program in Auburn.

Following a September 1995 hearing on various temporary orders, Husband and Wife stipulated to joint legal custody, and agreed Wife would have the majority of shared parenting time. In November 1995, the parties stipulated that Husband would pay Wife $415 per month in child support, and Wife would pay Husband $99 in spousal support - - a net

payable to Wife of $316 per month. They also agreed to recalculate child and spousal support at a late date with mandatory modification retroactive to September 1, 1995.

Trial commenced on August 15, 1996, with both parties appearing in propria persona. The court denied husband's motion for a continuance for lack of legal basis. Attorney Jerry Guthrie was present "to assist" Husband when trial continued the following day.[2]

The court set retroactive spousal support at zero, and terminated the right of either party to request spousal support under any circumstances. It also ordered dissolution of the marriage.

Trial on the remaining issues was held on February 14, 1997. Wife appeared in propria persona, and Husband was represented by Jerry Guthrie. The court heard the testimony of John J. Filipelli, a clinical psychologist, on the issues of child care. Husband and Wife also testified, both focusing largely on the question of how much in community funds was used to repay Husband's students loans during the course of the marriage. The court continued the proceedings to March 14, 1997, when additional unreported discussions apparently took place between the parties. The court ruled on the remaining issues on August 5, 1997, and issued a statement of decision on September 16, 1997. Among other things, the court ruled the community was entitled to reimbursement in the amount of $94,271, including accrued interest at 10 percent in accordance with section 2641. With respect to child care, the court ordered: "Each parent can continue to provide such child care for the child as each desires as is the current practice. The parties shall have joint legal custody with respect to the child's health, education and general welfare." Husband filed a timely notice of appeal on October 2, 1997.

Husband also filed a motion for reconsideration on October 23, 1997, claiming he had new and different facts to put before the court. On November 24, 1997, the court denied Husband's motion on the merits and because it was untimely. Two days later, Husband filed a motion for relief from judgment, which the court summarily denied on December

17,1997. He filed a second notice of appeal, including the posttrial orders, on May 26, 1998.

DISCUSSION

I

Husband's Right to Testify

Husband argues that "[t]he most egregious error on the part of the trial court was its denial of [his] right to testify at trial . . . . [¶] . . . [¶] At no time was [he] permitted to give direct testimony and tell his side of the story on his own behalf." Husband's argument is based on a misunderstanding of trial procedures.

The record reveals that at trial on February 14, 1997, Wife called Husband as an adverse witness under Evidence Code section 776. Husband was then questioned by his own attorney on redirect examination. Mr. Guthrie did not limit his questions to topics covered by Wife in her examination of his client. The examination ended when the court called a "short break" to allow Husband to show Wife a series of checks that were not shared with her before trial. We assume the court and the parties discussed the remaining trial issues in unreported proceedings which occurred that dy, and on March 14, 1997. The court asked Husband and Wife to file posttrial briefs, and filed its statement of decision six months later.

"A fundamental principle of appellate practice is that an appellant ' "affirmatively show error by an adequate record. . . . Error is never presumed. . . . 'A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent . . . .'"" (Null v. City of Los Angeles (1988) 206 Cal.App.3d 1528, 1532, citations omitted, emphasis in original.) There is nothing in the record to show the court prevented Mr. Guthrie from presenting the case on behalf of his client. Husband did, in fact, testify on cross-examination, and on redirect examination. We therefore reject Husband's claim he was denied the right to testify.

II

Due Process

In addition to the alleged denial of the right to testify at trial, Husband claims other acts and omissions constituting judicial misconduct had the cumulative effect of denying him due process.

The elements of procedural due process in judicial proceedings include jurisdiction, reasonable notice, and the opportunity for hearing. (7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 502, p.694.) "The right to a hearing includes the right to produce evidence and to cross-examine adverse witnesses." (Id, § 504, p.695.)

For reasons we explain, none of the incidents described by Husband - -viewed separately or together - - violated his right of due process.

A. Denial of Motion for Continuance of Trial:

Husband moved to continue trial on grounds Wife failed to answer certain interrogatories, the mediator's report was stale, Husband had no money to continue to pay an attorney, and Husband was unaware he was required to file a pretrial statement. The court denied the motion, stating: "Dr. Burkhart had an attorney, , at least until mid-July or early July. He had Mr. Paulsen as his attorney. Then he opted to hire attorney [Freda] Pechner . . . and since neither Mr. Paulsen nor . . . Ms. Pechner filed a pretrial statement 20 days prior to the date of the trail, the request for a continuance under local rules is denied." Husband argues he should not have been held accountable for the errors of prior counsel, and points out that Wife's pretrial statement was filed less than 25 days before trial. He contends the court erred in denying his motion for continuance.

The issues raised by Husband do not involve procedural due process. There is no question of jurisdiction or notice. Nor can Husband claim he was denied a hearing. He actively participated in the August 15, 1996, proceedings, and appeared the following day with counsel.

Motions for continuance are reviewed under an abuse of discretion standard. The trial judge has broad discretion in

ruling on motions to continue trial. (7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 10, p.36; In re Marriage of Johnson (1982) 134 Cal.App.3d 148, 154.) We conclude the court did not abuse its discretion by holding Husband accountable for the failure to file a pretrial statement, and denying the motion for continuance on that ground.

The Superior Court of Sacramento County Rules, rule 14.17(F) provides: "Where a matter is set for contested trial, both parties shall file and serve a 'Statement of Issues, Contentions and Proposed Disposition of the Case' at least 20 days prior to the trial date, . . . If both parties fail to timely file or serve a Statement pursuant to this part, the matter shall not be permitted to proceed to trial . . . . Failure by one party to timely file or serve a Statement pursuant to this rule will allow the complying party to proceed to trial or continue or drop the trial date and may result in the imposition of sanctions. . . . [¶] The Statement shall be filed and served 20 days before the trial or served 25 days before the trial if served my mail. . . ."

Husband substituted himself in place of attorney John H. Paulsen in June 1996. He substituted Freda D. Pechner as attorney of record on August 1, 1996. Thus, according to the record, Husband was representing himself at the time the pretrial statement was due mid-July. The situation is muddied by Guthrie's declaration in February 1997 that he was retained by Husband on July 5, 1996. The nature of his charge is unknown, and no substitution of attorney was filed at that time. However, regardless of which attorney, if any, was representing Husband at the time, he provided no satisfactory excuse for the failure to comply with local rule 14.17(F). Husband did not raise the issue of Wife's late filing of the pretrial statement at the time he moved for continuance of trial.[3]

C. The Nature of the March 14, 1997, Proceedings:

Husband also asserts the court neglected to inform and get consent of both parties before holding what the court loosely described as a settlement conference on March 14, 1997. Again, there is nothing in the record to support this assertion. Nor does husband explain how he was prejudiced

by the March 14, 1997, proceedings.

During the hearing on Husband's motion for reconsideration, Husband complained that although the March 14 proceedings were informal, the court was making decisions, and he wanted a court reporter present. The court disagreed, stating: "That was a different - - that was a kind of like a settlement conference. I sat there along with you and your attorney and we went through everything. [¶] . . . [¶] [W]e don't do court stenographer for settlement conferences." The handwritten notes on the minute order dated March 14,1997, suggest the judge went over what he wanted the parties to address in their posttrial briefs. Moreover, Husband was represented by counsel on that date. We assume Mr. Guthrie Would not have proceeded without his client's authorization to do so.

D. Failure to Rule on Violation of Restraining Orders:

Just before the break in the trial, Husband presented evidence that Wife had a balance of $21,000 in a voluntary pension under the Federal Retirement Thrift Investment Plan, and had borrowed against it. The court told Wife: "When we take the next break, I want you to sit down with Mr. Guthrie and go over this, because I don't even know what we're talking about, I don't know - - all I've got right now is this letter for the first time, that shows that you had a balance of [$]21,000 almost and you withdraw [$]17,000 almost. You're going to have to explain that." Husband now contends Wife's actions violated the standard of family law restraining orders, and the court erred in failing to rule on this issue. There is no merit in Husband's contention.

The voluntary pension was raised by Mr. Guthrie in the

context of arguments regarding valuation of various retirement plans and deferred compensation programs held in Wife's name. With respect to the Federal Retirement Thrift Investment Plan, Guthrie described the evidence as "Defining and putting a value on another asset of the community. [¶] . . . [¶] Apparently there's been a - - a borrowing." At no time did Husband or his attorney suggest Wife's alleged actions vio-

lated the standard restraining orders, or request a ruling on that issue. The court cannot be faulted for not doing what it was never asked to do.

E. Failure to Rule on Motion to Strike Claim of Reimbursement:

As we explained, the court issued its statement of decision on September 16, 1997. Husband filed his first notice of appeal on October 2, 1997. He then filed and calendared a motion for reconsideration which the court denied on November 14, 1997. Two days later, he filed an "Application To Strike Petitioner's Claim Of reimbursement" and a Motion For Relief From Judgment." The latter motion was calendared for hearing on December 17, 1997, and summarily denied. Husband argues the court denied him due process by failing to rule on the application to strike the reimbursement claim.

Contrary to Husband's argument on appeal, the court reached closure on the reimbursement issue when it ruled Husband was required under section 2641 to reimburse the community for expenditures for his student loans, and denied his motion for reconsideration. Even if the application to strike the reimbursement claim were a legitimate motion, it was clearly untimely. As the court explained to Husband at the December 17, 1997, hearing on the motion to set aside judgment, "What you have to do is appeal the decision that I made. You don't like my decision; appeal it. Don't keep on coming back here." We consider the merits of the reimbursement claim in section III of this opinion.

F. Failure to Disclose Financial Information:

Husband argues the judgment should be set aside because Wife failed to disclose complete and accurate financial information. Specifically, Husband states Wife did not file the posttrial brief, an updated income and expense declaration, and an updated schedule of assets and debts. Accordingly, he maintains the evidence is insufficient, and he is entitled to a mistrial or new trial.

Wife states in respondent's brief that she filed a posttrial brief with exhibits as ordered by the court. Together with an updated income and expense declaration. She main-

tains the documents were lost or stolen from the superior court file.[4] Husband moved to strike exhibits A and B of respondent's brief on the ground they are not part of the superior court record. After careful examination, we agree neither document is in the original superior court file. We did, however, find a copy of the judgment of dissolution endorsed the same date as the notice of entry of judgment. We grant Husband's motion to strike exhibits A and B. There is some support in the record for Wife's contention her posttrial brief disappeared after the court reviewed it. The court's handwritten notes for the August 5, 1997, hearing refer to "W's Ex, XYZ" and "W's Exh 'Q'." Wife's trial exhibits are numbered, not lettered. She argues the court was, in fact, referring to her posttrial brief..

We conclude there was sufficient evidence of Wife's financial condition to support the judgment. Answers to interrogatories with exhibits, filed with the court immediately before began in August 1996, documented Wife's employment history from 1993 through 1995. Trial exhibits included details of deposits and withdrawals from joint accounts around the time of separation, as well as voluminous documentation of the payments for Husband's education. Thus, there is no merit in the argument Husband was denied due process because Wife failed to file additional financial information after trial.

G. Failure to Hear Motion for Reconsideration

Husband asserts the court denied him due process by failing to "hear" his motion for reconsideration under Code of Civil Procedure section 1008, subdivisions (a) and (b).[5] Subdivision (b) reads: "A party who originally made an application for an order which was refused in whole or part of granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions

were made, and what new or different facts, circumstances, or law are claimed to by shown. For a failure to comply with this subdivision, any order made on a subsequent application may be revoked or set aside on ex parte motion." The motion was apparently directed at the September 16,1997, statement of decision on bifurcated issues, although that ruling is not identified in the motions papers.

"Section 1008 allows the trial court to reconsider and modify, amend or revoke its prior order when the moving party shows a different state of facts exists. 'An order denying a motion for reconsideration is interpreted as a determination that the application does not meet the requirements of section 1008. If the requirements have been met to the satisfaction of the court but the court is persuaded the earlier ruling was erroneous, the proper course is to grant reconsideration and to reaffirm the earlier ruling.' [Citation..] '[T]he party seeking reconsideration must provide not only new evidence but also a satisfactory explanation for the failure to produce that evidence at an earlier time.' [Citation.] " (Mink v Superior Court (1992) 2 Cal.App.4th 1338,1342.) As with the motion for continuance of trial, the court's decision whether to vacate the prior judgement on motion for reconsideration is within its broad discretion. (See Bartschi v. Chico Community Memorial Hospital (1982) 137 Cal.App.3d 502, 509.)

Contrary to Husband's characterization of the proceedings as a violation of due process, the court did, in fact, hear Husband's motion for reconsideration. It initially denied the motion on the ground it was untimely. The parties discussed whether Husband had been served with the statement of decision. The court then denied the motion "on the merits." It ruled that Husband failed to explain why he did not have the "new evidence" at trial. Husband relies on In re Marriage of Olson (1980) 27 Cal.3d 414, and Guardianship of Waite (1939) 14 Cal.2d 727, in arguing the court abused its discretion in the case before us. However neither case involved a motion for reconsideration after judgment. We conclude there was no violation of Husband's due process rights. Nor was there an

abuse of the trial court's discretion to deny the motion for reconsideration under Code of Civil Procedure section 1008.

H. Favoritism toward Wife:

Husband contends reversal is required because the court favored Wife by giving her legal advice on two occasions during the court proceedings. There is no merit in this contention.

The first incident cited by Husband occurred during Wile's direct testimony at trial. Wife was going over the checks drawn on community funds which were written to repay dental school loans. She indicated she had subtracted from the list checks used to pay for Husband's law school education, and the court stated those checks should be included. We view the court's comment as an informal ruling in the course of trial that the checks were properly considered under section 2641. Husband has not appealed the merits of that ruling.

The second incident occurred during the short hearing on Husband's motion for relief from judgment. Husband asked the court if he could have Wife sign a stipulation relating to California Rules of Court, rule 5.2. The court stated it could not give Wife legal advice. It suggested Wife read the stipulation carefully an "maybe get legal advice." The court continued, "I cannot tell you to sign it or not sign it. I don't even know what it is, and I'm not going to give legal advice - - [¶] . . . [¶] . . . to either party. . . ."

I. Ruling on Motion For Relief From Judgment:

After filing an unsuccessful motion for reconsideration, Husband moved for relief from judgment under Code of Civil Procedure section 473, subdivision (b).[6] Husband recites the grounds for relief listed in that statute, but again focused on the court's ruling on reimbursement to the community for educational expenses under section 2641. The court, denied the motion, stating: "Look, . . . Dr. Burkhart, you're doing the same thing over, and over, and over again. If you file another paper like this, I am going to sanction you, and sanction you very severely. [¶] What you have to do is appeal the decision that I made. You don't like my decision; appeal it.

Don't keep on coming back here."

The motion for relief from judgment is addressed to the sound discretion of the trial court. In the absence of a clear showing of abuse of discretion, the order will not be disturbed on appeal. (In re Marriage of Grissom (1994) 30 Cal.App.4th 40, 46) Husband made no showing of mistake, inadvertence, surprise, or excusable neglect. The motion was simply an attempt to reargue the merits of an issue decided against him at trial. The court was correct in explaining his recourse was appeal..Accordingly, we conclude there was no denial of due process, and no abuse of discretion.

III

Community Contributions to Education Under Section 2641 Professional education or acquired during marriage is not "property" subject to division on dissolution. (In re Marriage of Aufmuth (1979) 89 Cal.App.3d 466, 460-461, disapproved on other grounds in In re Marriage of Lucas (1980) 27 Cal.3d 808, 815.) However, "when one spouse works so that the other can attend school or otherwise pursue training for a new occupation or enhanced earing capacity, it is usually with the expectation that the community will benefit therefrom after the education or training is completed, thus, obtaining a fair 'quid pro quo' for the community's investment. If the marriage is dissolved before the community can realize this benefit, [section] 2641 recognizes a right of reimbursement in property division proceedings to redress the economic inequity." (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 1999) ¶ 8:811, pp. 8-192.10 - 8-192.11; see also Law Revision Com.. com., 29D West's Ann. Family Code § 2641 (1994 ed.) pp.143-144.)

The most contentious issue at trial, and in these appeals, involves the court's ruling under section 2641 that Husband owed the community $94,271 for payments made from community funds for his dental education. Although Husband characterizes the court's alleged error as an incorrect application of section 2641, in substance, his claim challenges the sufficiency of the evidence to support the court's determination.

When a court' findings are attacked on the ground there is no substantial evidence to sustain them, "'the power of an appellate court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.' [Citations.]" (Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 881, emphasis . . . an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this court, to be resolved in favor of the finding." (Bancroft-Whitney Co. v. McHugh (1913) 166 Cal. 140, 142.) Having carefully reviewed the record, we conclude there is substantial evidence to support the court's ruling.

Section 2641, subdivision (b) (1) provides that subject to certain statutory limitations, on dissolution of marriage or legal separation "[t]he community shall be reimbursed for community contributions to education or training of a party that substantially enhances the earing capacity of the party. The amount reimbursed shall be with interest at the legal rate, accruing from the end of the calendar year in which the contributions were made." The statute does not define reimbursable "Community Contributions," but the Law Revision commission comment which follows section 2641 states that "[t]hese expenditures would at least include the cost of tuition, fees, books and supplies, and transportation." (Law Revision Com. com.,29D West's Ann. Family Code, § 2641, supra, p.143.) "A loan incurred during marriage for the education or training of a party shall not be included among the liabilities of the community for the purpose of division . . . but shall be assigned for payment by the party." (§ 2641, Subd. (b) (2).)

Section 2641also provides that "[t]he reimbursement and assignment required by this section shall be reduced or modified to the extent circumstances render such a disposition unjust, including, but not limited to, any of the following:

"(1) The community has substantially benefitted from

the education, training, or loan incurred for the education or training of the party. There is a rebuttable presumption, affecting the burden of proof, that the community has not substantially benefitted from community contributions to the education or training made less than 10 years before the commencement of the proceeding, . . .

"(2) The education or training received by the party is offset by the education or training received by the other party for which community contributions have been made.

"(3) The education or training enables the party receiving the education or training to engage in gainful employment that substantially reduces the need of the party for support that would otherwise be required." (§ 2641, Subd, (c), emphasis added.)

Husband argues the order that he reimburse the community in the amount of $94,271 is unjust for several reasons: (A) the court entered incorrect figures when calculating the amount of reimbursement; (B) Husband's education is offset by Wife's education (§ 2641, Subd. (c) (2); (C) Husband's education reduces the need for Wife to pay support (§ 2541, Subd. (c) (3)); (D) Wife committed perjury, mislead the court, and covered up the offset of payments for education; and (E) Wife, who has more years of advanced training, is the person seeking reimbursement. The record does not support Husband's argument.

A. Figures Used in the Court's Calculations:
Husband based his calculations, in part, on the total tuition figure of $47,504 cited in a letter from the Associate Dean of the Creighton University School of Dentistry. This evidence was offered and rejected by the court in Husband's motion for reconsideration, and motion for relief from judgment. It was not before the court at trial, and is not properly before us on appeal.

Also included in the Husband's calculations is $22,000 which Husband insists was loaned from his parents. Wife testified it was a gift. The court ruled Husband failed to sustain the burden of providing the money was a loan. Hus-

band does not directly challenge that finding on appeal. Instead, his argument simply ignores the court's ruling.

Husband also disputes the amounts Wife claims the community paid for tuition while he was in dental school. He contends Wife was "double-dipping" her figures by depositing proceeds of a $7,500 student loan in the bank account, and writing tuition checks against it. However, wife testified at trial that to the best of her knowledge, student loan funds were paid directly to the university. She also submitted checks showing 1988 and 1989 tuition payments on Husband's behalf totaling $19,831.

We conclude the record supports the court's calculation of the amount of reimbursement under section 2641.

B. Offset of Husband's Education Against Wife's Education:

Husband says it was unjust for the court not to reduce the amount of reimbursement based on the education Wife received at community expense. However, Wife represented she had no student loans, and testified her father paid her dental school tuition. She testified that certain other payments from the couple's joint checking account were for community bills such as housing near her residency. Wife also stated the residency was a job for which she was paid. There is no evidence any significant amount of community founds was spent of Wife's education. Accordingly, there was no basis on which to award an offset of Husband's and Wife's education.

C. Alleged Fraud Upon the Court:

Husband argues Wife committed perjury, misled the court, and attempted to cover up evidence community funds were used to pay for her dental education. There is no factual basis for this argument.

The perjury claim arises from Wife's statement in her July 1995 schedule of assets and debts that she had no student loans. Husband insists her failure to list the $94,271 reimbursement claim for repayment of student loans and other educational expenses under section 2641 amounted to perjury. However, Wife's reimbursement claim was neither an asset nor debt at the time she completed the schedule. It represented money paid out of community funds before separation.

Husband cites testimony in which Wife contradicted his characterization of payments from joint accounts as evidence Wife misled the court and attempted to cover up offsets. The court was entitled to accept Wife's testimony as the more reasonable explanation of how the community funds were spent.

D. Reduction of Need to Support Husband:

In November 1995, the parties stipulated to wife paying Husband $99 per month in spousal support, subject to later review and recalculation. This amount was offset entirely by the $415 Husband was required to pay each month for child support. At trial on August 15, 1996, the court reduced spousal support to zero, and terminated the right of either party to request spousal support.

Husband now argues Wife would have had to pay more to support him if he had not gone to dental school, and therefore reimbursement is unjust under section 2641, subdivision (c) (3). This subdivision is directed to a specific circumstance: "If toward the end of a lengthy marriage one party, who had been a homemaker during the marriage and had never completed an education or developed job skill, receives education or training to enable him or her to be gainfully employed, reimbursement may be improper." (Law Revision Com, com ., 29D West's Ann. Family Code, § 2641, supra, p. 144.) This case presents a different factual circumstance. On this record, we conclude the court could reasonably find Husband's education did not "substantially reduce" Wife's spousal support obligation within the meaning of section 2641, subdivision (c)(3).

E. Wife Had More Advanced Training:

As a final point, Husband generally complains it is unjust for the court to order reimbursement of the community where "a dentist with mor years of advance training is the one seeking reimbursement for student loans." The court was thoroughly familiar with the record, having supervised the dissolution proceedings from the initial haring on temporary orders through trial and posttrial motions. Although section 2641, subdivision(c) provides for the reduction of modification

of the amount of reimbursement ordered "to the extent circumstances render such a disposition unjust," the court impliedly found the circumstances did not warrant such an adjustment in the circumstances of this case. We conclude the record supports the court's implied finding.

IV

Child Custody

Husband contends the court's order omitted reference to joint physical custody, and ignored Dr. Filipelli's recommendation regarding cay core. He also complains the court failed to enter a final judgment of dissolution.

In a report dated January 30, 1996, Dr. Filipelli recommended that there be "[j]oint legal custody with natural mother continuing as Garrett Jr.'s primary physical custodian." He also recommended that "an equally shared co-parenting arrangement . . . be considered within the next year or two when Garrett's Jr.'s cognitive, emotional, language, social and general adaptive development is mor advanced." At the continuation of trial of February 14, 1997, the parties generally agreed to accept Dr. Filipelli's recommendations on issues other than day care. Husband acknowledged in his posttrial brief that the court had ordered "that either [party] may seek a return to F.C.S. anytime after June 1997, for consideration of an equally shared co-parenting arrangement." (Underscoring in original.)
Accordingly, it was unnecessary for the court to address the issue of physical custody in the September 16, 1997 statement of decision.

The record does not support Husband's assertion the court ignored Dr. Filipelli's recommendation on day care. In its statement of decision, the court recounted Filipelli's testimony, but stated it " did not find [it] enlightening as he essentially testified as he wrote in his report of a year [before]." The court noted Dr. Filipelli talked with a key person at Granite bay Learning Center "much longer" than he spoke with Ms. Test. It then concluded, "[i]n light of the forgoing, Court rules that each parent can continue to provide such child care for the child as each desires as is the current practice . . .

."

Wife attached an endorsed copy of the notice of entry of judgment of dissolution as exhibit B to respondent's brief. We granted Husband's motion to strike both exhibits A and B on the ground they were not part of the court record.[7] However, we assume Husband's question regarding entry of judgment of dissolution is now resolved to his satisfaction.

V

Property Division

Husband argues the court failed to divide the community property equally. Specifically, he contends: (A) the court divided the property without an appraisal; (B) Wife misappropriated community assets; (C) the court failed to divide the FERS pension; and (D) the court failed to divide the community debt. We already rejected Husband's claim that Wife failed to disclose financial information.[8]. The remaining claims are not supported by the record.

A. Division of Property Without Appraisal:

Husband contends the court stated it would appoint an appraiser to value the chattels, then failed to do so. There is, of course, no requirement that an appraise be used to assist in property valuation. In this case, however, the court never ordered appointment of an appraiser. Instead, the parties struggled to resolve the dispute, and the court adopted Wife's proposed division with on exception.

The record reveals that Wife filed a pretrial statement of issues in which she listed the community property, placed a value on it, and proposed a property division. Husband filed no pretrial statement.

The court warned the parties on the first day of trial on August 15,1996, that if they were unable to agree on the value of each chattel, it would refer valuation to an attorney who would charge them "anywhere from two hundred to four hundred dollars an hour, . . . [¶] So rather than do that, it's much easier if you two will just sit down and agree upon who is going to get what and at what value." When trial continued the following day, Husband was "assisted" by Mr. Guthrie. He parties discussed the chattels, item by item. Although Hus-

band and his attorney raised the possibility of appraisal during the ensuing discussion, the court indicated it did not intend to fool around with a dispute over furniture and wedding gifts. It reminded Husband he had not filed a pretrial statement on those issues. After additional discussion, the court accepted Wife's proposed division, except that the dental equipment was awarded to Husband at zero value.

B. Misappropriation of Community Assets:

Husband asserts Wife borrowed $16,526.72 against a community pension without his knowledge.[9] He suggests the funds might have been used for a separate property purpose at the time Wife acquired the residence at 101 Hingham Square in Folsom. Husband states that "[t] his all occurred prior to trial so that Dr. Burkhart's interests and rights in the property need to be determined."

In his posttrial brief, Husband asked that his community interest in the Federal Retirement Thrift Investment Plan be set at $8,732. The court valued the community interest at $17,464, and credited to Husband the amount he requested in property division. There is no basis for Husband's claim of error.

C. Division of the FERS Pension:

The court valued the FERS pension at $12,362 in community value, and confirmed it to Wife. Husband maintains the FERS pension should have been divided equally. However, in his posttrial brief, Husband requested the allocation confirmed by the court in its statement of decision. We therefore cannot now reverse course.

D. Community Debt:

Husband contends the court erred in leaving all the community debt to him - - specifically, the $22,000 personal loan from his parents, and $2,864 plus interest from credit card. He also claims the court erred in charging him for certain bank withdrawals.

We have already explained the court found Husband failed to sustain the burden of proving the $22,000 received from his parents was a loan.[10] With respect to the community debt and bank withdrawals, Wife filed a pretrial statement and

produced detailed documentation at trial in support of her proposed division of community debt. Husband filed no pretrial statement. The court carefully reviewed the documentation regarding credit card payments and bank withdrawals before ruling on those issues. We conclude the record supports the court's findings, and there is no merit to Husband's claim the court failed to divide the community debt.

DISPOSITION

The judgment and orders are affirmed.

CALLAHAN , J.

We concur:

SCOTLAND , P.J.

DAVIS , J.

[1]Undesignated statutory references are to the Family Code.

[2]Although there is no substitution of attorneys in the record on appeal, Guthrie declared in February 1997 that he was retained by Husband on July 5, 1996.

[3]Trial began on August 15, 1996. Wife filed her pretrial statement on July 25, 1996. The clerk's transcript does not contain proof of service. However, if Wife mailed the pretrial statement to Husband on July 25, she failed to comply with the requirement for service set forth in local rule 14.17(F).

[4]Wife attached a copy of her posttrial brief, without exhibits, as exhibit A to respondent's brief. The document does not have a file stamp indication it was filed in superior court. Also included as exhibit B is an endorsed copy of entry of judgment of dissolution.

[5]Code of Civil Procedure section 1008, subdivision (a) provides: "When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that make the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown."

[6] Code of Civil Procedure section 473, subdivision (b) read in part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall . . . be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken."

[7]See, ante, at page 13, footnote 4.

[8]See discussion, ante, at pages 12-13.

[9]We already discussed these funds in the context of Husband's claim Wife violated the standard restraining orders. See discussion, ante, at pages 10-11.

[10]See discussion, ante, at page 21.

Diana L. Quilici, D.D.S. 101 Hingham Square Folsom, California 95630 Telephone: (916) 983-2753 Petitioner In Pro Per	FILED ENDORSED 97SEP 16 PM 3:36 SACRAMENTO SUPERIOR COURT DEPT. #27

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

In re the Marriage of: Petitioner: DIANA L QUILICI AND Respondent: GARRETT BURKHART _____/	**CASE No. 95FL04792** **STATEMENT OF DECISION AND JUDGMENT ON BIFURCATED ISSUES**

STATEMENT OF DECISION

FEDERAL RETIREMENT TSP ACCOUNT

Respondent's community share of the Federal Retirement TSP Account is $8,732 with total community interest being $17,464. If the overall accounting at the conclusion of these proceedings show that Respondent owes Petitioner, then this will be an asset which should be used to pay Petitioner.

FERS

The $12,362 value is the appropriate community value since vesting was a virtual certainty. The $12,362 in community value will be awarded and confirmed to Petitioner.

PRUDENTIAL INVESTMENT

Respondent and Petitioner each already have their respective shares divides equally, no Court action is necessary and the previous divided amounts are confirmed to each party.

WELLS FARGO BANK

$3,714 from Wells Fargo Bank was withdrawn by Petitioner and she has not shown that Respondent either took or used the moneys. At trial Petitioner was unable to show that Respondent withdraw or used $2,800 on 3/27/95 and $600 on 4/10/95. $3,714 from Wells Fargo Bank shall be charged to Petitioner.

FIRST NATIONAL BANK OF OMAHA

There is no basis for Respondent's contention that there is doubt that Petitioner 's paychecks went into the bank account of First National Bank of Omaha. The documents clearly show that Petitioner's paychecks went directly from her employer to the bank. All deposits and expenditures were community except as otherwise discussed hereafter. See Petitioner's Exhibit "XYZ" and Exhibit "I". There will be no charge to Petitioner lf $3,204.39 or any amount whatsoever related to petitioner's pay checks.

HOME SAVINGS OF AMERICA

Although Respondent states that Respondent's Exhibit "R" shows that there was $20,000 in the several accounts at Home Savings between April and July 1995 and that Petitioner should be charged with $20,000, the evidence does not support his claim. In fact, the claim is frivolous because the evidence at the trial clearly showed the contrary. (See Petitioner's Exhibit 1 to 4. The moneys in account no. 098008902-3 (7/13/95 of $3,049.12, account no. 44-069899-1 (7/13/95) $4,071 and account no. 044-071815-3 (7/13/95) $502.58 were transferred to account no. 044-068565- from which Petitioner tool out $7,500 on 7/13/95 to pay her attorney Mary Martinelli, and that Petitioner was already charged with that amount at the 8/90 trial.

Respondent also fails to acknowledge that the money in account no. 044-068794-5 was used partially for Dr. Filipelli and $5,000 was already charged to Respondent for $5,000 retainer with Jill Demmel. In addition, when the account was closed by Respondent and Petitioner together on

11/21/95, $1,018.69 ($1,014.69 plus $4.00 charged) and Petitioner used it for payment to her attorney Mary Martinelli.

As for the other amounts alluded to by Respondent, the evidence at the trial established that from account no. 098008902-3, $2,500 was used to pay a community credit card debt on 4/1/95, $500 was used to pay Franchise Tax Board taxes on 4/1/95, and $3,000 on 5/1/95 for Respondent's car. In addition respondent withdrew $500 on 1/20/95 for UNC Law School (community expenditure), $285 on 4/8 ($200 cash plus $85 check), $860.53 on 4/8, and $1,635 ($590 cash and $1,045 check) on 6/9. It was further established at trial that on 6/17 Petitioner withdrew $650 in cash and $285.13 for Mercy Hospital bill (total of $935.13), on 5/19 $250 cash for herself and $703.97 for credit card payment (total of $953.97), $250 cash on 5/26 and $156.56 cash on 7/17/95. In addition Petitioner had withdrawn $973.54 on 7/13/95 from account 044-068565-9.

In the absence of other evidence the Court finds that the other amounts of $280 (1/13), $470 (1/13), $587.59 (2/17), 4225.30 (3/20, $100 (5/26) and $100 (5/26) were for community purposes and not chargeable to either Respondent or Petitioner.

Summary:

	Respondent			Petitioner
4/8/95	$200.00	Cash	6/17	$650.00 Cash
	85.00	Check	5/19	$250.00 Cash
	$860.53	Check	5/26	$250.00 Cash
6/9/95	$590.00	Cash	7/17	$156.56 Cash
	$1,045.00	Check	11/21	$1,018,69 Attorney fees
				$973.54 Check
	$2,780.53			$3,298.79

Therefore: $3,298.78 Petitioner received from Home Savings
$2,780.00 Respondent received from Home Savings

Chargeable to Petitioner $518.78

STUDENT LOANS

As the outset Respondent asserted that he had about $2,500 left over from the 1987 student loans when he married Petitioner on 3/5/1988. However, Respondent has no evidence whatsoever to support this claim- undoubtedly, it would be impossible to trace the $2500 or whatever amount. As for 1989, there is not doubt that Respondent received a $7,500 student loan; but there is no evidence that Respondent deposited that sum into any bank account. Further, Petitioner asserts that the $7,500 was never deposited into any community account; instead the $7,500 went directly from the lender to Creighton University. Thus, the Court finds that the payments in the fall of 1988, the two payments in 1989 and the $3,300 of 1/16/90 were in addition to the $7,500 loaned in 1989. Thus, Respondent should be charged with $6,512 (1988), $13,319 (1989) and $3,300 (1990).

With respect to the alleged repayment, respondent has not substantiated his contention that his parents loaned Respondent and Petitioner, or Respondent alone $22,000. Respondent's Exhibit "T" proves absolutely nothing - it is not a promissory note; there is no due date; there is no agreement by anyone to pay anything; there is no interest provision; there is no date of execution. Furthermore, in his own sworn statement in his answers to interrogatories, Respondent states in one statement that it was a gift, and in another that it was a loan.

Further, Respondent stated twice in his answers to interrogatories, answers provided at his leisure, that the amount of the loan or gift was $20,000, not $22,000. And strangely, Respondent does not state where the $20,000/ $22,000 went and for what it was used. Incidentally, Petitioner says that he received it on 8/20/90. Since Respondent asserts that the $20,000/$22,000 was a loan, he has the burden of proving it; yet he has not done so even with all the time he had available to now. This, the Court rejects Respondent's position that the community owes $20,000/$22,00 or something else.

With respect to Respondent's claim that he supported

the community while Petitioner went on to obtain an advanced degree has no factual basis. In fact, petitioner has shown to the contrary. Petitioner's Exhibit "Q", which is supported by her tax returns, clearly demonstrates that she was earing more income each yours than Respondent.

Furthermore, Respondent could not pass the California dental boards until after his fifth failure. And there is no doubt that Respondent did not sacrifice his ability to obtain an advanced dental degree - after all, he could not even pass the basic California boards. Although the community expended over $5,000 expressly to enable Respondent to become an eligible dentist, the Court is not ordering any reimbursement for the said $5,000 plus.

REPAYMENT OF RESPONDENT'S EDUCATIONAL LOANS

Petitioner presented Petitioner Exhibit "6" which sets out each check which was used to pay Respondent's education loans and expenses. Respondent had admitted in his answers to interrogatories a substantial portion of the payment as having come from the community.

Although Respondent claims that $6,512 for 1988, $$13,319 for 1989, and $3,300 for 1990 were repaid by way of loans from his parents, Court rejected that claim. (See page 6, supra.) In addition to the prior discussion, enforcement of the loan, even if it was a loan, is barred by the Statute of Frauds and Statue of Limitations as against Petitioner.

As for Respondent's claims the payment were from community funds but that the source of those funds were his separate property are not proven. Respondent has produced not a single piece of evidence to sustain his position. Circumstantially the evidence does not support Respondent - after all, Petitioner earned substantially more income than Respondent during 1991, 1992, 1993, and 1995. Further, Respondent has identified a single non-community source for those years.

Thus, except for the $2,186 which was paid in 1994 for UNC Law School, the entire amounts set out in Exhibit "6" will be subject to reimbursement in accordance with Family Code §2641. Here the community did not benefit substantially

from Respondent's education. After all, Respondent did not pass his dental boards until late 1994. There is evidence now that the dental degree helped substantially after he passed the dental board in California on his 6th try. Rather than contributing to the community, Petitioner diligently assisted and supported Respondent in his six attempts to pass the dental boards.

Thus, the Court finds that the community expenditures were:

1988	$6,512.00
1989	13,319.00
1990	4,140.00
1991	6,031.00
1992	5,799.00
1993	6,500.00
1994	6,652.00 ($8,838 - $2,186 [UNC])
1995	3,229.00

Plus accrued interest at 10% per year. (See exhibit A hereto incorporated herein by this reference.)

PARENTING TIME

I Respondent= 116 hours every 2 weeks x 26 weeks 3,016

II Respondent= 2 weeks summer vacation=

a) 168 hours/week x 2 = 336

b) Minus 116 hours for which Respondent received credit in I above <116> 220

III Father's day of offset by Mother's Day -0-

IV Birthday, every other year: 40 hours divided by 2 = 20

V One-half Holidays:

Xmas	168
New Year	168
Easter	168
Thanksgiving	96
Martin Luther King Day	24
President's Day	24
Memorial Day	24
July 4th	24
Labor Day	24
Columbus Day	24

Veteran's Day	24
	768 divided by 2 = 384
384- 134* =	250
Total	3 ,506

3,506 / 8,736 (Total hours in year)=Respondent's parenting time is calculated at 40%

*134 hours is the time Respondent would have had during his 384 hours of vacation/holiday time under V above

CHILD SUPPORT

1. There is no factual for Respondent's contention that child support should be $368 and that Petitioner should pay him $179 in spousal support. The 11/21/95 Stipulated Court Order provides that Respondent and Petitioner would recalculate by no later than 3/1/96 child and spousal support retroactive to 2/1/95. That was not done and the 11/21/95 Stipulation is a final Court Order. Further, there is no dissomaster printout attached to the Stipulated Order for the Court to ascertain how the child and spousal support was calculated.

2. In any event, the child support issue is moot because as of 3/1/96, Respondent's income was $4,854 per month as evidence by his own, signed, Income and Expense Declaration of 5/10/96. Respondent's child support would have been higher - neither party's 401(k) is considered. [See attached Exhibit B (Trial Exhibit I)].

3. The child support now is $87 per month payable by Respondent to Petitioner, [see attached Exhibit C (Trial Exhibit II)], which sets out in detail the breakdown. The court gave each party $50 for professional education and license, approximately $$1,200 in property tax and interest deductions to Petitioner, and $425 and $536 in 401(k) type deductions to Respondent and Petitioner respectively. Spousal support was computed at 35%; thus the Court reserves jurisdiction over child and spousal support and orders no payment by either party at the present time.

ATTORNEYS FEES AND COSTS

Each pay own

FEBRUARY 18, 1997 HEARING

Court did not find Dr. Filipelli's testimony enlightening as he essentially testified as he wrote in his report of a year ago. He had one telephone conversation with Ms. Testa and one telephone discussion with a key person at Granite Bay Learning Center (GBLC). Based on his testimony, it is clear that Dr. Filipelli's discussion with GBLC was much longer than with Ms. Testa. It was also curious that Dr. Filipelli had nothing to say about the long relationship of the child with Ms. Testa, a relationship that was started and matured by both Petitioner and Respondent. Dr. Filipelli's testimony related to his two telephone conversations of over a year ago as applied to a mediation that was concluded well over a year ago.

In light of the foregoing, Court rules that each parent can continue to provide such child car for the child as each desires as is the current practice - both providers have advantages that are beneficial to the child.

As far as legal custody is concerned, the Court orders the parties shall have joint legal custody with respect to the child's health, education and general welfare. However, if the parties demonstrate an inability to responsibly communicate with each other regarding these issues, the Court will order sole legal custody.

This order shall be made a party of the decision that will be rendered after the continued trial.

PREPARATION OF ORDER

Petitioner/Petitioner to prepare the proposed Judgment on the Bifurcated Issues and submit to Respondent/Respondent for approval as to form and content.

JUDGMENT

Based on the findings of the Court set forth in the above Statement of Decision the Court Orders as follows:

1. **FEDERAL RETIREMENT TSP ACCOUNT:** If the overall accounting at the conclusion of these proceedings show that Respondent owes Petition, then this will be an asset which should be used to pay Petitioner.
2. **FERS:** The $12,362 in community value will be awarded

and confirmed to Petitioner.

3. **PRUDENTIAL INVESTMENT**: No Court action is necessary and the previous divided amounts are confirmed to each party.

4. **WELLS FARGO BANK:** $3,714 FROM Well Fargo Bank shall be charged to Petitioner.

5. **FIRST NATIONAL BANK OF OMAHA:** There will be no charge to petitioner of $3,204.39 or any amount whatsoever related to Petitioner 's pay checks.

6. **HOME SAVINGS OF AMERICA:**

Therefore: $3,298.78 Petitioner received from Home Savings
$2,780.00 Respondent received from Home Savings Chargeable to Petitioner $518.78

7. **STUDENT LOANS**: Thus, the Court rejects Respondent's position that the community owes $20,000/$22,000, and neither party will be charged with or credited with any amount whether it be $20,000, $22,000 or something else. Although the community expended over $5,000 expressly to enable Respondent to become an eligible dentist, the Court is not ordering any reimbursement for the said $5,000 plus.

8. **REPAYMENT OF Respondent'S EDUCATIONAL LOANS**: Although Respondent claims that $6,512 for 1988, $13,319 for 1989, and $3,300 for 1990 were repaid by way of loans from his parents, Court rejected that claim, enforcement of the loan, even if it was a loan, is barred by Statute of Frauds and Statute of Limitations as against Petitioner. Respondent's claims that payments were from community funds but that the source of those funds were his separate property are no proven. Thus, except for the $2,186 which was paid in 1994 for UNC Law School, the entire amounts set out in Exhibit "6" will be subject to reimbursement in accordance with Family Code §2641. Respondent shall reimburse community as follows for community expenditures for his student loans:

1988	$6,512.00
1989	13,319.00
1990	4,140.00
1991	6,031.00
1992	5,799.00
1993	6,500.00
1994	6,652.00 ($8,838 - $2,186 [UNC]
1995	3,229.00

Plus accrued interest at 10% per year which totals $33,519. (See Exhibit A hereto)

9. **PARENTING TIME**: 3,506 / 8,736 (Total hours in year)= Respondent's parenting time is calculated at 40%

10. **CHILD SUPPORT:** Court reserves jurisdiction over child and spousal support and corders no payment by either party at the present time.

11. **FEBRUARY 18, 1997 HEARING DECISION:** Each parent can continue to provide such child care for the child as each desires as is the current practice. The parties shall have joint legal custody with respect to the child's health, education and general welfare. However, if the parties demonstrate an inability to responsible communicate with each other regarding these issues, the Court will order sole legal custody.

ORDER

IT IS SO ORDERED
Dated: SEP 16 1997

_____
JUDGE OF THE SUPERIOR COURT

CHARLES C. KOBAYASHI

EXHIBIT A

Year	Amount	Interest 10%	Total Interest
1988	$6,512	$651	$651
1989	$13,319	$7,163+$13,319=	
		$20,482 x 10%=	$2,048
1990	$4,140	$4,140+$22,530=	
		$26,670 x 10%=	$2,667
1991	$6,031	$6,031+$29,337=	
		$35,368x10%=	$3,536
1992	$5,799	$5,799+$38,904=	
		$44,703x10%=	$4,470
1993	$6,500	$6,500+$49,173=	
		$55,673x10%=	$5,567
1994	$6,652	$6,652+$61,240=	
		$67,892x10%=	$6,789
1995	$3,229	$3,229+$74,681=	
		$77,910x10%=	$7,791

Totals as of 12-1995 : Loan repayment amount: $52,182 Interest:$33,519 Interest at the end of 12-96 $85,701 x 10%= $9,427 + $33,419= $42,946 The total community expenditures at present including accrued interest at 10% equals $94,271.